United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-1190

ORIGINAL

To be argued by
IRWIN ROCHMAN

In The

United States Court of Appeals

For The Second Circuit

B

P/S

UNITED STATES OF AMERICA,

Appellee,

vs.

IP KEI WAI,

Appellant.

On Appeal from the United States District Court for the Eastern District of New York

APPELLANT'S BRIEF

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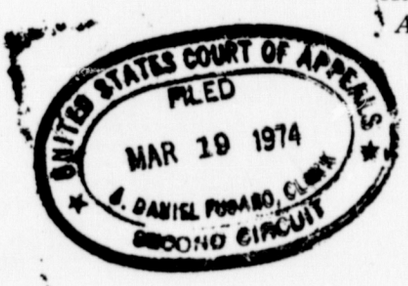

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CASES CITED

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1190

UNITED STATES OF AMERICA,

Appellee,

-v-

IP KEI WAI,

Appellant.

APPELLANT'S BRIEF

Preliminary Statement

Ip Kei Wai (Ip) appeals from a judgment of conviction of the United States District Court for the Eastern District of New York (The Hon. Edward Coffrin) entered on January 23, 1974, after a three day jury trial.

The three count indictment in this case named three defendants: Ho Cheung Sing (Ho), Seng Kar Wong (Wong) and appellant. Each defendant was named in each count. The first count charged illegal importation of approximately four pounds of heroin into the United States. (21 U.S.C. 952(a), 960(a)(1)). Count Two

charged possession with intent to distribute the same heroin. (21 U.S.C. 841(a)(1)). Count Three charged a conspiracy to import and possess with intent to distribute the same heroin. (21 U.S.C. 816, 963).

Appellant was convicted of all three counts, as was defendant Wong. Defendant Ho was convicted under counts two and three only.

Appellant was sentenced to a prison term of six years on all three counts, to be served concurrently. Upon consent of the Government, appellant is presently free on bail pending this appeal.

Prior to and during the trial, a hearing on a motion, joined in by all three defendants, to suppress the heroin seized in this case, was heard by the court and denied (41, 168).*

Questions Presented

1. Whether the evidence was sufficient to establish that appellant knew there was heroin hidden in a package in his possession.

2. Whether the trial court's failure to charge,

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*All numerals, unless otherwise indicated, refer to page numbers of the minutes of trial.

as requested, that knowledge that heroin was hidden in the package was an essential element of all counts, constituted prejudicial reversible error.

3. Whether the trial court's instruction that the element of knowledge which the Government was required to prove referred only to knowledge that it was illegal to import heroin, was so misleading and inadequate, as to constitute prejudicial reversible error.

4. Whether the trial court's denial of appellant's other requests to charge concerning, "mere presence," the absence of surreptitious behavior, and evidence as consistent with innocence as with guilt, all of which were inextricably related to the issue of whether appellant knew there was heroin hidden in the package, constituted prejudicial reversible error.

5. Whether the trial court erroneously denied the motion to suppress brought below, because it incorrectly concluded that the search in this case was a Customs search rather than a search by Drug Enforcement Administration agents.

Statement of Facts

At the trial, the Government's principal witnesses were Drug Enforcement Administration (hereinafter

DEA) agents, and employees of Japan Air Lines (hereinafter JAL). Viewed in the light most favorable to the Government, their testimony revealed the following:

On August 2, 1973, a package from Hong Kong, China, containing desk accessories, arrived at JAL Cargo Terminal, consigned to GAT Trading Company, in care of defendant Ho, at his address, 60 East Broadway, New York, New York. The package was approximately three feet, by two feet, by two feet, in size. At the request of DEA agents, a Customs official opened the package, and using a power drill, discovered heroin inside one of the desk sets (184, 185).

Later the same day, Ip's car was observed entering the JAL Cargo Terminal parking area (194-197). Shortly thereafter, defendant Wong entered the JAL Cargo Terminal and asked for the package. He was told by a JAL employee that the package had not been located, and that he should return the next day (235-237).

That evening, DEA agents examined the contents of the package, and with the use of a power saw, discovered heroin inside twelve of the desk sets and one of the globes contained in the package (250-259).

The next day, August 3rd, Ip's car was again observed entering the same parking area (197, 198). Ip

parked the car. Wong and Ho were also in the car. While Ip and Ho waited in the car, Wong went into the JAL Cargo Terminal (238, 239, 302-305). Inside the terminal, Wong signed for and received the package, using a false name (304, Government's Exhibit No. 5). No evidence was presented to show that Ip ever knew that Wong had signed a false name.

Wong carried the package out to Ip's car in the parking area. Ip got out of his car and helped Wong place the package in the trunk of the car (307-310).

Ip, Wong and Ho drove to Guernsey Street, in Brooklyn, New York, where Ip parked his car five or six car lengths from number 142, the building in which he lived (483). Ip removed the package from the trunk of his car, and all three men walked to Ip's building. Ip was carrying the package. The three men entered the vestibule of the building, followed by a DEA agent, who then arrested them. About twenty minutes later, DEA agents entered Ip's apartment. Approximately three hours later, the apartment was searched by DEA agents after a warrant had been obtained. The search lasted about one hour. No tools of any kind, nor any items ordinarily used in diluting heroin and preparing it for resale, were found (498, 499, 501, 560).

ARGUMENT

POINT I

The evidence was insufficient to establish that appellant knew that there was heroin secreted in the package.

Viewing the proof in the light most favorable to the Government, it is submitted that there was insufficient evidence from which the jury could fairly conclude beyond a reasonable doubt (see United States v. Taylor, 464 F.2d 240 (2d Cir. 1972), that appellant knew that heroin was hidden in the desk sets and globes found in the package. Mere possession of a package in which heroin has been secreted, is insufficient to establish knowledge on the part of the possessor of the presence of heroin. United States v. Moler, 460 F.2d 1273 (9th Cir. 1972); United States v. Hou Wan Lee, 264 F. Supp. 804 (S.D.N.Y. 1967).

The only evidence presented against Ip established that he drove Wong and Ho to the airport; that Wong picked up the package there; that Ip and Wong placed the package in the trunk of Ip's car; that Ip then drove the car to his house; and that Ip then removed the package from the trunk of his car and carried it into the vestibule of the house, all while in the company of Wong and the consignee

of the package, defendant Ho.

In United States v. Moler, supra, 460 F.2d 1273, the facts were as follows:

A package from India, which contained three and one-half pounds of marijuana, was consigned to John Peaters, c/o Family for Skin, at a store address. The store imported goods from India, and defendant Titus was in charge of this aspect of the business. The package was delivered to the store and received by a woman in the front of the store. Defendant Moler examined the package and picked it up. At some point he yelled, "Whoopee" or "Yippee" and jumped up and down. He carried the package into a back room, accompanied by defendant Titus. While they were in the back room, the government agent, who was in the store while all this occurred, heard the sound of cloth tearing. Moler acknowledged having carried the package into the back room and handing it to Titus. Titus stated that they both had carried it into the back room to inspect it. In the back room some "tins" and a pipe containing small quantities of marijuana were found. Numerous potentially incriminating letters and other evidence which tended to show that both defendants were familiar with obtaining and using small quantities of marijuana were also introduced into evidence. Moler, supra, Government's Brief on Appeal, pp. 5-7, 15, 16.

Moler and Titus were charged with importing marijuana and possessing it with intent to distribute. In reversing the convictions on both counts for insufficiency of evidence, the Court of Appeals held that although the evidence revealed that both defendants had possession of the marijuana, possession was not sufficient to establish importation, and, more significantly, that there was no, "competent evidence . . . which proves or tends to prove that either of the appellants knew the contents of the parcel or . . . intended to distribute its contents." Moler, supra, at 1274.

In United States v. Hou Wan Lee, supra, 264 F. Supp. 804, the circumstances surrounding Lee's obtaining of and actual possession of furniture in which contraband was hidden, were as follows:

A shipment of eighteen cases of furniture and slippers consigned to the defendant by his father, arrived in New York from Hong Kong. Customs officials searched the cases and found contraband jade secreted in false compartments in two cabinets. The shipment was thereafter delivered to defendant's store in New York during the daytime, where customs agents observed the defendant unpack part of the shipment, and saw him move one of the cabinets to the rear of the store. The shipment remained in the store, and later that evening, the customs agents observed the defendant, "take the second cabinet to the rear of the store

where he appeared to work over it vigorously. However, they could not see him actually remove any jade." Lee, supra, at 806.

Judge Mansfield held in Lee that these facts were insufficient as a matter of law to establish that Lee was guilty of the crime of knowingly possessing the contraband jade, and wrote as follows:

> ". . . the proof possessed by the agents when they made the arrest was insufficient to establish that a crime was being committed by the defendant in their presence. On the key issue of whether the defendant knew of the presence of the contraband jade secreted in the furniture, the agents saw him take possession of the furniture and apparently work on it in the rear of his shop, but they never actually saw him remove or indicate conscious possession of a single piece of jade before he was arrested." Lee, supra, at 808.[1]

At the trial of the case at bar, appellant most strongly contested the sufficiency of the Government's evidence relating to the issue of whether he knew of the presence of the heroin hidden in the desk sets and globes. As a matter of law, appellant should have prevailed. In-

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[1] Although the court in Lee was ruling on a motion to suppress, the case involved the application of New York Law, which required the court to review the evidence to determine if it was sufficient to convict Lee of the crime of knowingly possessing contraband jade. Lee, supra, at 808.

deed, the evidence in the instant case is lacking even the kind of circumstantial proof of knowledge present in Moler and Lee. Appellant simply drove the two other defendants to and from the airport. After Wong picked up the package, Ip and Wong placed it in the trunk of Ip's car. Ip drove the two defendants to the street on which he lived and carried the unopened package into the vestibule of his building, making no attempt to conceal it, accompanied by the two co-defendants.

Moreover, apart from this evidence, there was undisputed evidence which tended to negate any inference that Ip knew heroin was secreted in the package. Ip was arrested at about 3:30 P. M. Approximately twenty minutes later, DEA agents entered his apartment. Some of the agents apparently remained there until about 6:30 P. M. when appellant's apartment was searched for approximately one hour, pursuant to a search warrant. No tools, such as power drills or saws, which would have been necessary to remove the heroin from the desk sets were found. No narcotics paraphernalia ordinarily used to dilute high purity heroin and to package it for resale, e.g., milk sugar, glassine envelopes, etc., were

found in the apartment (501, 560).[2]

In addition, Ip made no effort to conceal his identity or activities, and this is significant evidence that he did not have knowledge that there was heroin hidden in the package. See, United States v. Infanti, 474 F.2d 522, 526, 527 (2d Cir. 1973).

In Infanti, this court found that the circumstantial evidence concerning an attorney's conduct in

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[2]The Government argued in its summation that Ip's behavior upon being confronted by the DEA agent in the vestibule -- Ip dropped the package, "and proceeded to make one or two steps through the door," (7A) -- constituted "flight," and therefore some evidence of consciousness of guilt. However, the Government did not request a jury instruction relating to flight, and none was given, quite probably because defense counsel's objections to this portion of the Government's summation caused the Government to withdraw this contention. In any event, appellant's dropping a large package, when one considers that he is a very small man who was suddenly confronted by a DEA agent 6 feet 4 inches tall, who weighed 250 pounds and who pointed a gun at him (499) and taking one or two steps in a small vestibule, could hardly be described as flight. It is more accurately described as fright and surprise -- the reaction, appropriate to the circumstances, of a startled, frightened man, whose command of English and whose comprehension of our culture, is still somewhat limited. It is submitted that these facts do not constitute flight. Furthermore, even if these facts could be deemed to constitute flight, the probative value of flight is of a very low order, Wong Sun v. United States, 371 U.S. 471, 483, n. 10 (1963) ("(W)e have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of the actual or supposed crime"), and the probative value of these facts is so small as to defy measurement.

relation to stolen securities was insufficient to establish that the attorney (Kurtz) had knowledge of their character. Kurtz accompanied Infanti, the person who possessed the securities, to Germany, was in the hotel room when a sale of the stolen securities under highly questionable circumstances was attempted, and then hurriedly left Germany for London with Infanti.

The court held that the evidence was insufficient to establish knowledge on the part of Kurtz that the securities were stolen, although the court stated that it, "would have been obvious to Kurtz, a lawyer, that Infanti's dealings were less than legitimate," and despite the fact that Kurtz gave a false exculpatory statement, because Kurtz's statement, "may well have been a simple mistake in light of the fact that Kurtz apparently made no other efforts to conceal his European activities." Infanti, supra, at 526, 527.

The court had previously stated that, "Kurtz made no attempt to hide his activities in London (or in Frankfurt for that matter) as might be expected were he aware of the illegal purpose of Infanti's trip." Id., at 526.

The package in this case was at least as innocent on its face as the packet of securities in Infanti. The circumstances surrounding Ip's behavior, and his behavior itself, did not begin to approach the suspicious circumstances and Kurtz's questionable conduct in Infanti. Ip did nothing to conceal his identity or his activities. He drove his own car, registered in his own name. He drove past a surveillance booth where his car would be observed by security guards and his license recorded. He took the package directly to the building in which he lived in an apartment under his name, making no effort to conceal the package.

Under the circumstances of this case, and applying the rule of United States v. Taylor, supra, 464 F.2d 240, it is submitted that the trial judge erred in not granting the motion for judgment of acquittal as to all three counts, because, upon the evidence presented, a reasonable juror must have a reasonable doubt that appellant knew that heroin was hidden in the package.

POINT II

The trial judge's inadequate and misleading charge to the jury with respect to the essential element of appellant's knowledge of the secreted heroin, as well as his failure to charge as requested with respect to such knowledge and the circumstantial evidence related thereto, constituted prejudicial reversible error.

The primary issue urged by appellant was that the Government had failed to meet its burden of proving beyond a reasonable doubt that appellant knew there was heroin hidden in the package. "(T)hat burden had to be met on the basis of proper instructions." United States v. Clark, 475 F.2d 240, 249 (2d Cir. 1973).

It is submitted that the instructions given on this issue were clearly improper. Appellant requested a charge that knowledge that there was heroin hidden in the package was an essential element of all three counts. Not only did the trial court fail to grant this request, but the instructions it chose to give on this issue were so grossly inadequate and misleading, that the issue of whether appellant knew there was heroin hidden in the package, was never fairly and clearly presented to the jury.

In addition, appellant requested charges concerning the significance which could properly be attributed by the jury to certain circumstantial evidence (mere presence at the scene of a crime and the lack of any attempt by appell-

ant to conceal his activities or identity) and a charge that if the evidence was as consistent with innocence as with guilt, then the jury must acquit. The trial court compounded its error in failing to charge properly with respect to the issue of knowledge of the secreted heroin, by failing to grant these additional requests on matters closely related to that issue.

a) The trial court's failure to instruct that knowledge of the heroin in the package was an essential element of all three counts, and the misleading and inadequate instructions the court gave on the issue of knowledge.

Appellant requested the court to charge that the Government had to prove beyond a reasonable doubt that appellant knew there was heroin hidden in the package, and that this was an essential element of all three counts.[1]

---

[1] "Under the facts of this case, an essential element of each of the three counts charged in this indictment is that the defendants knew, had actual knowledge, that there was heroin in the desk sets and globes contained in the package which is Government's Exhibit 1, and, as I have previously instructed you, the prosecution must prove this element, like every single other element of the crimes charged, beyond a reasonable doubt...." Appellant's Request to Charge No. 2, "Knowing Possession."

Appellant also requested the following charge:

"...No defendant is under any obligation to explain his possession of the package in question. It is the obligation of the Government to prove beyond a reasonable doubt that each defendant knew that the package contained heroin." Appellant's Request to Charge No. 5.

(All requests to charge referred to in this Point II are set out in full in the Appendix.)

United States v. Moler, supra, 460 F.2d 1273; United States v. Hou Wan Lee, supra, 264 F. Supp. 804. Never were the jurors so instructed in plain words. Appellant unsuccessfully renewed this request after the jury asked for a definition of "possess" (734).

With respect to the importing count, the trial court charged that there were three "essential elements," 1) the act of importing, "2) that the defendant knew that it was unlawful to import heroin into the United States, and with such knowledge intentionally imported the heroin into the United States and 3) that the drug imported was in fact heroin." (659,660). (Emphasis supplied.)

This language, without more, left the jury to believe that the only element of knowledge required to be proven was knowledge that it was unlawful to import heroin and that if appellant, acting with that knowledge, "intentionally" imported heroin, they should convict on the importing count.

The court went on to define, "knowingly and intentionally:"

> "The second element that the government must prove beyond a reasonable doubt is that the defendant acted knowingly and intentionally. An act is done knowingly if it is done voluntarily and intentionally, and not because of mistake or accident or some other innocent reason. An act is done intentionally if it is done knowingly, voluntarily, and willfully, and with a specific intent to do something which the law forbids. That is,

with a purpose to either disobey or disregard the law.

* * *

"You should consider the acts and conduct of each defendant and whether such facts, if you believe them, make it likely or unlikely, probable or improbable, that the defendant fully and precisely understood what he was doing. If you are not convinced beyond a reasonable doubt that each defendant knew that the narcotic substance was unlawfully imported, you must acquit the defendant on this charge." (660-662). (Emphasis supplied.)

In this definition of "knowingly and intentionally," the court completely failed to make clear that the Government had to prove that appellant had actual knowledge that there was heroin secreted in the package, not simply that he knew it was unlawful to import heroin.

The court referred to intent and knowledge again in a manner which conveyed to the jury that the element of "knowledge" did not include knowledge that there was heroin hidden in the package. "Still, differently stated, an aider and abetter must have the same knowledge and intent required as a principal. Thus proof of the defendant's knowledge of the illegal importation is necessary to convict him." (664). (Emphasis supplied.) This was the only "knowledge" referred to by the court.

With respect to the second count, possession with intent to distribute, the court again did not state that

knowledge of the secreted heroin was an essential element of the crime. Instead, the court simply referred back to the previously discussed language.

> "The second element of the offense is that possession was knowing or intentional. In this regard the instructions concerning the meaning of knowing and intentional acts which I gave you earlier are applicable." (666).

The court also again referred the jury back to its charge on aiding and abetting (667).

With respect to the conspiracy count, the court's charge was similarly defective because the court repeated and referred back to the phrases and definitions quoted above, which could only further exacerbate the failure to charge that knowledge of the secreted heroin was an essential element as to all counts.

> "The second element is that the defendant knowingly and willfully was a member of the conspiracy charged in the indictment. To satisfy the second element you must find that the defendant knew the objects of the conspiracy, either knowingly and intentionally importing into the United States from a point outside thereof a quantity of heroin, or of knowingly and intentionally possessing with intent to distribute a quantity of heroin.
>
> You need not find, however, that the defendant had full knowledge of all of the details of the conspiracy. You must also find that the defendant knowingly and will-

> fully participated in the conspiracy with the intent to further some object or purpose of the conspiracy.
>
> By knowingly and willfully, I mean that the defendant acted voluntarily and intentionally with the intent being to disobey or disregard the law." (674, 675).

This language, particularly the last quoted paragraph, again limits the concept of knowledge to knowledge that importing or possessing heroin is illegal. There is no language which makes clear that knowledge of the secreted heroin was an essential element of the conspiracy count.

This argument, "is not . . . a case of nit-picking over nuances in a judge's charge; the errors go directly to a defendant's right to have the jury told what crimes he is actually being tried for and what the essential elements of those crimes are." United States v. Fields, 466 F.2d 119, 121 (2d Cir. 1972).

b) The trial court's denial of requests to charge with respect to evidence as consistent with innocence as with guilt, and with respect to appellant's failure to conceal his activities or identity.

Appellant requested the court to charge that, "if two sets of inferences may reasonably be drawn from

the evidence, one consistent with innocence and the other with guilt, then you must not convict because, as I have explained, the Government must prove each and every element beyond a reasonable doubt." 1 Devitt & Blackmar, Federal Jury Practice and Instructions, 2d Edition, Section 11.01, at p. 206.

This was not a request to charge that the evidence, circumstantial or otherwise, must exclude every reasonable hypothesis but guilt, which has repeatedly been denied by this court. See, United States v. Taylor, supra, 464 F.2d 240, 244.

This court has approved an instruction in practically the same words as those requested. United States v. Cacchillo, 446 F.2d 231, 234 (2d Cir. 1969).

The failure to grant this request constituted prejudicial reversible error because appellant's primary defense was that his actions were consistent with those of an innocent man -- one who did not know that there was heroin secreted in the package.

Appellant also requested a charge which was based on United States v. Infanti, supra, 474 F.2d 522, to the effect that if the jurors found that the defendants did not engage in surreptitious behavior, did not conceal their activities or identities, such evidence was to

be considered by the jurors and was itself sufficient to raise a reasonable doubt.[2]

The failure to grant this request constituted prejudicial reversible error because if the jury found that appellant had made no effort to conceal his activities or identity (the record clearly supports such a conclusion), they should have considered such evidence as evidence negating any inference that Ip knew there was heroin hidden in the package, and they therefore could properly have determined that such evidence alone was sufficient to create a reasonable doubt on the essential element of such knowledge.

These two requests were inextricably intertwined. The failure to grant both deprived appellant of having the jury understand, in the proper legal context, the significance of the absence of any attempt by him to conceal his activities or identity.

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[2] "To the extent that the defendants made no attempt to hide their identities or activities, as might be expected were they aware that the package contained heroin, this would be evidence sufficient in and of itself to raise a reasonable doubt in your minds that the defendants actually knew the package contained heroin, and you must therefore, if you so find, acquit the defendants of all the counts charged." Appellant's Request to Charge No. 4.

c) The trial court's denial of a request to charge with respect to mere presence at the scene of a crime.

Appellant requested a charge based on United States v. Garguilo, 310 F.2d 249, 253 (2d Cir. 1962), which included language to the effect that mere presence at the scene of the crime was not, by itself, sufficient evidence to establish guilt beyond a reasonable doubt.[3] Although the court did charge with respect to the other matters contained in this request (663), the court gave no instructions concerning, "mere presence," and stated that it was denying counsel's "mere presence" request (546). The court's denial constituted prejudicial reversible error. United States v. Terrel, 474 F.2d 872, 876 (2d Cir. 1973).

The only evidence against appellant, aside from his possession of the package, was his presence at JAL at the time Wong picked up the package, and his being in the presence of Ho, the consignee of the package. If the jury was not satisfied beyond a reasonable doubt

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[3] "Mere presence at the scene of a crime, mere knowledge that a crime is being committed, merely associating with persons who are commiting a crime, is not itself a crime and is not, in and of itself, sufficient evidence to satisfy you beyond a reasonable doubt as to a defendant's guilt either as an aider and abetter under Count One or Two, or as a conspirator under Count Three." Appellant's Request to Charge No. 1.

that appellant knew there was heroin secreted in the package, but was so satisfied with respect to Wong and/or Ho, then the failure to instruct on the legal insignificance of "mere presence" may have allowed the jury to believe that they could convict appellant merely on the basis of his presence at the scene of the crime.

POINT III

The warrantless search of the package made without probable cause by DEA agents for DEA purposes, was in violation of the Fourth Amendment.

The heroin in this case was initially discovered when a Customs official opened the package and drilled holes in one of the desk sets, at the request of DEA agents. Everything else relating to the search of the package and the ensuing investigation and arrests, was done by the DEA. No search warrant was applied for or obtained for the package. The Government, therefore, had the burden of proving that the DEA agents had probable cause to search, "by clear and convincing evidence." 8A Moore's Federal Practice, 41-08 (4). It is submitted that the Government did not meet this burden.

The only evidence offered by the Government with respect to probable cause was the testimony of DEA agent Logan, concerning his conversation with DEA Agent Maher. Logan testified that Maher told him that Maher had spoken to an informant and, "that they had reason to believe (the package) . . . possibly contained narcotics, specifically heroin." (93).

Logan also testified that, "I think he mentioned something about a previous case they had made at a

similar address . . . . They thought there was narcotics in there, specifically heroin." (109, 110). This was the entire testimony relating to the informant. After this conversation with Maher, Logan asked the Customs inspector to open the package (105).

Logan knew only what he had been told by Maher. Maher's suspicions were based on what this unidentified informant had told him.

An informant's information may provide probable cause only if the Government establishes both that the informant has based his conclusions on reliable data, and that the informant is a truthful person generally. Aguilar v. Texas, 379 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969). The above-described testimony relating to the informant clearly does not meet this two-pronged test.

Even if the search was based upon probable cause, the general rule is that such warrantless searches are per se unreasonable under the Fourth Amendment. Katz v. United States, 389 U.S. 347, 357 (1967). The exceptions to this general rule are, "jealously and carefully drawn, and there must be a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative . . . the burden is on those seeking the exemp-

tion to show the need for it . . . ." Coolidge v. New Hampshire, 403 U.S. 443, 454-455 (1970). The Government did not meet its burden; there were no exigent circumstances justifying the failure to obtain a search warrant. The DEA agents had possession of the package, they knew the name and address of the consignee, and they could control the time and place of the picking up of the package by anyone.

There was ample time after the initial opening of the package for the DEA agents to secure a search warrant for the seizure of the package and its contents before the next day, when defendant Wong had been told to return (237).

The Government apparently conceded that ordinary Fourth Amendment requirements of warrant and probable cause had not been met, because it sought to justify the search and seizure by claiming that it was effected by the Customs officials. Searches and seizures by Customs officials are not required to meet the same rigorous Fourth Amendment standards as searches by other governmental agencies.

Both of the trial court's rulings denying the motion to suppress were based on this distinction between Customs searches and searches by other agencies; the trial court held that the requirements of 19 U.S.C. 1482, which

gives only Customs officials the power to search if they have, "reasonable cause to suspect," that contraband is being imported, had been met (40, 167).

19 U.S.C. 1482 is only applicable if the search in this case was in reality a Customs search, which means a search by Customs officers, "made solely in the enforcement of Customs laws. . ." as distinct from,

> ". . . other official searches made in connection with general law enforcement. The validity for this distinction is found in the fact that the primordial purpose of search by Customs officers is not to apprehend persons, but to seize contraband property unlawfully imported or brought into the United States.'" Alexander v. United States, 362 F.2d 379, 382 (9th Cir. 1966), cert. denied, 385 U.S. 977 (1966). (Emphasis supplied.)

It is submitted that the search and seizure in the case at bar was not a Customs search. It was in substance a search by DEA agents who initiated, ordered, directed and controlled the search, using the Customs officials as mere "tools" in order to avoid the requirements of the Fourth Amendment.

The Customs official's participation in the search and seizure was limited to the initial part of the search (the first opening of the package and drilling holes in one of the desk sets.) Customs Inspector Guistra did not

rely on his own observations or experience as a Customs official when he opened the package. He not only failed to arrive at an independent decision to inspect the package, he truly did not even participate in that decision. When asked what the DEA agents had said to him prior to his opening the package, he stated: "They told me they would like to have this package examined when I get it and I should examine it carefully and that is all I did -- follow the instructions." (17). (Emphasis supplied.)

Logan's version of this conversation was that he, "indicated the substance," of his conversation with Maher to Guistra (93).

The first time Guistra or any other Customs official saw the package or had any knowledge of it, was when DEA Agent Logan asked Guistra to inspect it (105).

The package was opened by Guistra in the presence of the DEA agents and another Customs inspector (14, 15).

Inside the package were numerous desk sets and plaster globes. Guistra stated that, "We examined the package . . . I examined the package and I find (sic) it to be suspicious and I drilled a hole and out come the contents." (14).

DEA agents made a "preliminary field test," of

the "contents," a brown powder (106). A DEA agent took a sample of the brown powder to a laboratory. The package was then repacked, and placed in the JAL package room (15, 16). Later that day, DEA agents removed the package to a DEA office at the airport (15, 16).

At the DEA office, the DEA agents, utilizing a power saw, opened most of the desk sets; one of the globes was broken open with a hammer (250-259). The heroin was removed, the package was repacked and brought back to JAL at about 6:00 A. M., the next morning. DEA agents, undercover and surveillance, maintained control over the package until it was picked up by defendant Wong that afternoon.

In determining whether the search in this case was a Customs search, as opposed to a DEA search, the court should, "be viligant to scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods. Constutional prohibitions for the security of person and property, are to be liberally construed . . . ." Byars v. United States, 273 U.S. 28, 32 (1927).

In those cases in which this court has determined that the search in question was a Customs search, the

initial investigation, the decision to search, the search, the follow-up investigation and the arrests were made by Customs officials in the enforcement of Customs laws, acting on their own observations, experience and initiative, without the presence, direction, or even aid of any other governmental agencies. See, United States v. Doe, 472 F.2d 982 (2d Cir. 1973); United States v. Glaziou, 402 F.2d 8 (2d Cir. 1968); United States v. Gonzales, 483 F.2d 223 (2d Cir. 1973).

The facts of this case are strikingly similar to those in Corngold v. United States, 367 F.2d 1 (9th Cir. 1966). An airline employee opened a package at an airport, "because of the government's customs agents' request." That was the"only reason" he opened it. Custom agents were present when the employee opened the package, and they "helped" the employee by, "holding the flaps so he could look inside and we could look inside." The Customs agent then took a number of small boxes out of the larger package and opened them.

The court concluded that the "TWA employee participated in the search solely to serve the purposes of the government," and that the "search was in substance a federal search cast in the form of a carrier inspection to enable

the officers to avoid the requirements of the Fourth Amendment." Corngold, supra, at 4, 5.

If the carrier had acted on its own initiative and for its own purposes; if the carrier had decided that an inspection, which it had the power to make, was required; if the carrier had simply permitted the Customs agents to physically open the package; if upon discovery of contraband the Customs agents had then obtained a search warrant, the search would have been proper. See, United States v. Blum, 329 F.2d 49 (2d Cir. 1964), a case in which the Government did not rely on the special powers conferred on Customs officials (Blum, supra, Brief for the Government, at p. 29) and the court agreed that the search was the act of the private carrier.

In Corngold, the issue was whether the search was a government agency search or a private carrier search. In the case at bar, the question is whether the search was in reality a Customs search or a DEA search. The questions are really the same -- who actually was responsible for the search. The criteria for determining the question should therefore be the same, without regard to the identity of the parties involved in the search.

It is clear that the DEA agents simply used Guistra as a handy and easy way of avoiding Fourth Amendment re-

quirements of probable cause and the obtaining of a warrant.

As in Corngold, once Guistra had, "followed instructions," by opening the package, and then drilled holes in one desk set while two DEA agents were present, DEA took over completely. It is clear that DEA was in complete control of the package and would make all the decisions as to what would be done with the package and how the investigation would proceed. Later that evening, without consulting or informing any Customs officials, DEA agents returned to the JAL Cargo Terminal, removed the package, and made a complete and exhaustive search of the contents. The investigation, surveillance and arrests were conducted exclusively by DEA.

In a later case, the Ninth Circuit distinguished Corngold:

> "We conclude that the initial search of the packages by the airline's employee was not a federal search, but was an independent investigation by the carrier for its own purposes. Unlike Corngold, here the agents did not request that the package be opened, and they were not present when it was opened. The agents had the same right as any citizen to point out what they suspected to be a mislabeled shipping document, and they exercised no control over what followed. What did follow was the discretionary action of the airline's manager and was not so connected with government participation or influence as to be fairly charactered, as was the search in Corngold, as a 'federal search cast in the form of a carrier inspection.'" Gold v. United States, 384 F. 2d 588, 591 (9th Cir. 1967). (Emphasis supplied.)

In the case at bar, the Customs officials did not exercise any discretion; they did not make an independent decision to search; the package was taken to the place where Guistra opened it at the direction of the DEA agents; the DEA requested that the package be opened and the DEA agents were present when Guistra opened the package.

Assuming, arguendo, that the search was not completely and exclusively a DEA search, it is, nevertheless clear that DEA initiated, directed and participated in a joint search. The legal effect of such active DEA participation, which was far greater than the Customs official's "participation," is the same as though DEA had engaged in the undertaking as one exclusively its own. Corngold, supra, at 6.

If DEA agents choose to initiate, participate significantly in and control a joint search, the search and seizure must meet ordinary Fourth Amendment standards. In determining whether federal participation in an illegal search with state officers should preclude use of the seized evidence in a federal prosecution, Mr. Justice Frankfurter stated the test as follows:

> "But search is a functional, not merely physical, process. Search is not completed until effective appropriation as part of an

> uninterrupted transaction is made of illicitly obtained objects for subsequent proof of an offense."
>
> * * *
>
> "The decisive factor . . . is the actuality of a share by a federal official in the total enterprise of securing and selecting evidence by other than sanctioned means." Lustig v. United States, 338 U.S. 74, 78, 79 (1949).

Not even a superficial view of the facts in this case would justify any conclusion other than that the search was a DEA search, conducted for DEA purposes, and not a Customs search. The Fourth Amendment may not be so easily circumvented.

> "The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and the colonies; and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right." Byars, supra, at 34.

CONCLUSION

The judgment of conviction against Ip should be reversed and the case remanded with a direction that he be acquitted.

Respectfully submitted,

IRWIN ROCHMAN
Attorney for Appellant

A 202 Affidavit of Personal Service of Papers H LUTZ APPELLATE PRINTERS INC.

U.S. COURT OF APPEALS:SECOND CIRCUIT

Index No.

U.S.A.,

Appellee,

against

Affidavit of Personal Service

IP KEI WAI,

Appellant.

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Victor Ortega, *being duly sworn,*

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1027 Avenue St. John, Bronx, New York

That on the **19th** *day of* **March** *1974 at* **225 Cadman Plaza, Brooklyn, N.Y.**

deponent served the annexed Appellant's Brief *upon*

~~Rax~~ U.S. Attorney for the Eastern District-Attorney for Appellee

the *in this action by delivering* 2 *true copy* ies *thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein,*

Victor Ortega

Print name beneath signature

VICTOR ORTEGA

Sworn to before me, this **19th** *day of* **March** *19* 74

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0113950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975